

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	DOCKET FILE COPY ORIGINAL
)	
Amendment of Section 73.202(b))	MM Docket No. 92-214
Table of Allotments)	RM-8062
FM Broadcast Stations)	RM-8144
(Columbia, Bourbon, Leasburg,)	RM-8145
Gerald, Dixon and Cuba, Missouri))	RM-8146
)	RM-8147

RECEIVED

FEB 15 1996

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Reichel Broadcasting Corporation ("RBC"), an applicant for Channel 297C3 at Cuba, Missouri,^{1/} by its counsel, hereby opposes the petitions for reconsideration filed by Lake Broadcasting, Inc. ("Lake") and Central Missouri Broadcasting, Inc. ("CMB") on January 11, 1996, and January 16, 1996, respectively, to the Report and Order, 10 FCC Rcd 12624 (1996), in the above-captioned proceeding.^{2/} Lake also filed related petitions for reconsideration in MM Docket 91-352 (Ava, Branson and Mountain Grove, Missouri) and MM Docket 90-195 (Brookline, Missouri). Each of these filings stems from a pending petition for reconsideration filed by Lake in MM Docket 89-120 (Northweye, Cuba, Waynesville, Lake Ozark and Eldon, Missouri). See Report

^{1/} On February 7, 1996, RBC filed its application for Channel 297C3 at Cuba within the window filing period. No file number has been assigned yet.

^{2/} Public Notice of these filings was published in the Federal Register on January 31, 1996. The deadline for oppositions was set for February 15, 1996.

No. of Copies rec'd
List ABCDE

024

and Order, 7 FCC Rcd 1449 (1992), recons. pending. RBC urges the Commission to deny Lake's petition for reconsideration and remove the resulting uncertainty and delay in authorizing the Cuba channel.

BACKGROUND

1. Lake's underlying proposal to upgrade its Station KBMX(FM), Eldon, Missouri, was defective and denied by a Report and Order four years ago. In its petition for reconsideration, Lake did not contest the Commission's decision in MM Docket 89-120 to favor a first local service to Lake Ozark over the substitution of Channel 270C1 for Channel 270A at Eldon. Rather, Lake focused its attention on what it described as a less desirable "alternate proposal" to the "Recommended Solution" set forth in its October 6, 1989, "Counterproposal Reply Comments", i.e., to substitute Channel 221A for Channel 272A at Waynesville, Missouri. For this solution, Lake did not submit a channel study in support relying instead on a channel study proffered by CTC Communications, Inc., ("CTC") licensee of Station KLOZ(FM), Eldon, Missouri, in CTC's reply comments.^{3/}

2. In note 13 to the MM Docket 89-120 Report and Order, supra, the Commission stated that "all other channels proposed or recommended by the various parties do not comply with our

^{3/} The suggestion that Channel 221A could be allotted to Waynesville was offered by CTC to resolve the conflict between proposals for Lake Ozark and Northweye, Missouri, in MM Docket 89-120. Northweye was denied an allotment in that proceeding because it did not qualify as a community and therefore the conflict did not need to be resolved.

minimum distance requirements." This statement would include Channel 221A for Waynesville.

LAKE'S PETITION FOR RECONSIDERATION

3. Lake argues that the Cuba channel (297C3) should not have been allotted as a second FM channel because the only other party expressing an interest in applying for the channel, Zimmer Radio of Mid-Missouri, Inc. ("Zimmer"), effectively withdrew that interest in a pleading filed on September 28, 1995, more than two and one half years after the comment and reply comment periods were closed. Lake argues that Zimmer abandoned its interest in Channel 297C3 when it stated in its September 28, 1995, pleading that "...Lake's counterproposal to upgrade KFXE, Cuba, Missouri, from Channel 271A to Channel 297C3 can be accommodated...."

4. Recognizing that Zimmer's statement was not clearly expressed as a withdrawal of its interest, Lake suggests that if the Commission should refuse to regard Zimmer's statement as an abandonment, the Commission's attempt to sever this proceeding from MM Docket 89-120 was improper. Lake refers to note 12 of the Report and Order, supra, in this proceeding, where the Commission determined that Lake itself had indicated a willingness to accept a Class C2 upgrade for KBMX, Eldon for which it has a pending application (BPH-930922IE) rather than wait for the Class C1 upgrade. As Lake points out, should Lake obtain a Class C1 upgrade, then Channel 271A must be deleted from Cuba and a replacement channel (297A) allotted instead for

KFXE. However, if Channel 270C2 is allotted instead, then Channel 271A can remain at Cuba and Channel 297C3 can be used as a second FM channel for which RBC has applied.

5. Lake now argues that its willingness to accept a Class C2 upgrade was conditioned on "immediate" action which it asserts was not forthcoming. Now that nearly three years have passed since Lake made that statement, Lake insists that this "solution" has expired.

DISCUSSION

6. In order to preserve its ability to upgrade Station KBMX, Eldon, Missouri, to Class C1, Lake has filed numerous pleadings in MM Docket 89-120 offering various alternatives none of which has succeeded. Lake has also filed petitions for reconsideration in three other proceedings involving various communities in Missouri. The effect of these filings is to automatically stay the upgrades of stations in Columbia and Branson, Missouri, and to delay the processing of applications in Cuba, Dixon and Brookline, Missouri, along with channel substitutions ordered at Bourbon, Ava and Mountain Grove, Missouri, while numerous other proposals remain in limbo. The Commission is well aware that Lake's qualifications to remain a licensee are the subject of a hearing. See Order to Show Cause and Notice of Apparent Liability, 10 FCC Rcd 13685 (1995) ("OSC"). In the OSC, at paragraph two, the Commission decided to hold in abeyance all pending applications and rule making

proceedings involving Lake pending resolution of its basic qualifications to remain a licensee.

7. As a result, the Allocations Branch was placed in a position as to whether it should also delay new or expanded service to the various communities involved in the three other rule making proceedings or to find a resolution during the pendency of Lake's hearing. The Allocations Branch decided that, as a matter within its discretion, it could reasonably recognize and rely upon one of the alternatives offered by Lake which proposed a Class C2 upgrade at Eldon. This alternative was attractive to Lake if it could be effectuated at an earlier date than the Class C1 proposal which was both uncertain and subject to perhaps years of further administrative and possible judicial appeals.

8. Lake now argues that it only wanted a Class C2 if the Commission were to grant that upgrade immediately. Of course, Lake fails to note that its own qualifications were the reason that its application for a Class C2 facility (BPH-930922IE) is still pending.

9. That application was never withdrawn by Lake. As a result, the Commission staff had every reason to believe that Lake was still interested in obtaining a Class C2 upgrade if it could not have a Class C1.

10. The Commission struck a reasonable balance in preserving a Class C2 upgrade for Eldon while responding to various proposals for new channels in Cuba, Dixon and Brookline, Missouri, and upgrades in Branson and Columbia, Missouri. This effort by the Commission was well within its discretion and its public interest obligations. Otherwise, new or expanded service to these communities could be delayed for years.

11. As stated, the Commission staff was not aware that Lake had abandoned its Class C2 proposal. Lake's application was not withdrawn nor did Lake withdraw its rule making comments which stated that it was willing to accept a Class C2 upgrade. The Commission should not be placed into a position of guessing whether Lake's interest in a Class C2 was still pending or not. It is Lake's responsibility to clarify its statement and/or withdraw its Class C2 application. It did neither. Lake's extremely late attempt to withdraw its Class C2 upgrade in the petition for reconsideration should be given no credence particularly since the Class C2 application has not been withdrawn.

12. Lake alleges that Zimmer withdrew its interest in Channel 297C3 at Cuba by virtue of Zimmer's statement in support of KFXE's upgrade. However, Zimmer's late pleading of September 28, 1995, was accompanied by a "Request for Leave to File Supplemental Comments." There is no indication in the Report and Order in this proceeding that Zimmer's request was granted.

Section 1.415(d) of the Commission's Rules provides that "no additional comments may be filed unless specifically requested or authorized by the Commission." As a matter within its discretion and for the purpose of conducting its processes in an orderly fashion, the Commission staff is well within its rights to refuse consideration of this pleading.^{4/}

13. Notwithstanding the Commission's refusal to consider these comments, the withdrawal of Zimmer's interest is not so clear. Zimmer set forth a scenario whereby it seemed to prefer an upgrade for KCMQ to Class C1 over filing an application for a new station at Cuba, Missouri. Under this allotment scenario set forth by Zimmer, Zimmer was willing to support Lake's KFXE upgrade. However, such support was not unconditional and the Commission could reasonably find that the interest that Zimmer had clearly expressed in an earlier pleading was not so clearly withdrawn in this pleading.

14. In any event, RBC, for one, has filed an application for Channel 297C3 at Cuba, Missouri, and sincerely desires to construct and operate its proposed station. RBC's interest in

^{4/} In this regard, Zimmer's filing merely recites that the proposal of Jeff Weinhaus for Leasburg, Missouri, and Tony Krupp for Gerald, Missouri, were withdrawn and a proposal for California, Missouri, was denied. Thus, Zimmer's upgrade proposal could be effectuated. The Commission staff was aware of each of these matters without Zimmer's pleading. Thus, when the Commission stated in paragraph one that "no further consideration will be given to the counterproposals filed by Weinhaus and Krupp or to responsive comments", the Commission was including those of Zimmer.

retaining the Cuba channel as a second FM service is clear and recognizable by the Commission. In view of this preferred outcome, the Commission can now rely on RBC's application.

CMB'S PETITION FOR RECONSIDERATION

15. CMB urges the Commission to allot Channel 243A to Dixon rather than Channel 221A because the allotment of Channel 221A is still subject to the outcome of MM Docket 89-120 and the available site area is not as attractive as the area available for Channel 243A. RBC opposes CMB's preference for Channel 243A only to the extent that the overall allotment plan adopted in this rule making proceeding would be overturned. Should the Commission determine that Channel 243A could be allotted to Dixon while retaining Channel 297C3 at Cuba, RBC would not object.

16. However, to the extent that a reversal of the allotment decisions in this case would affect Channel 297C3 at Cuba, RBC offers the following comment. The Commission has consistently refused to favor one potential applicant's preference for a certain channel, even if the applicant is the petitioner. The reason for this policy is that there is no guarantee that the petitioner will be the only applicant and others may feel differently as to the economic viability of one channel over another. Thus, CMB's stated preference cannot be accommodated over other meritorious proposals.

RESOLUTION

17. In a supplemental pleading filed on January 5, 1993, Lake suggested that Channel 264A may be available as a substitute at Waynesville. According to the enclosed channel study it appears that Channel 264A can be used at KJPW's transmitter site. The only impediment is a listing for a Channel 265A counterproposal at Osage Beach, Missouri. That proposal was dismissed by Report and Order in MM Docket 90-66, 7 FCC Rcd 3015, note 2. A petition for reconsideration is currently pending. The availability of Channel 264A as a substitution at Waynesville would allow the Commission to sever all other proposals in this proceeding, including Channel 297C3 at Cuba and preserve the possibility of KBMX, Eldon, receiving an upgrade to Channel 270C1 at some future date.

CONCLUSION

18. The Commission has been confronted with Lake's interest in Channel 270C1 at Eldon for approximately six and one-half years. The Commission staff made a reasonable effort to resolve this proceeding and two others while Lake's basic qualifications to remain a licensee are in litigation. In doing so, the staff recognized that to do otherwise could take many more years. In view of Lake's stated interest in a Class C2 upgrade and pending application for a Class C2, the Commission could reasonably conclude that Lake had not abandoned its interest in the Class C2 which was certain over the Class C1 which is still uncertain.

19. Furthermore, Zimmer's expressed interest in the Cuba channel was not clearly withdrawn. Rather, Zimmer proffered a scenario in which KCMQ's upgrade could be accommodated along with KFXE's upgrade. This pleading was not accepted and considered by the Commission staff. The staff was well within its discretion to act in that fashion. In any event, the Commission can recognize RBC's pending application as support for retaining the channel.

20. Nevertheless, should the Commission agree that Channel 264A is available as a substitute for Waynesville, the Commission staff can sever three docketed proceedings, including Cuba, Missouri, and finalize the allotments made in those proceedings while, at the same time, preserve the possibility of a Channel 270C1 upgrade at Eldon.

21. In view of the above, RBC urges the Commission to retain Channel 297C3 at Cuba for which it has applied and thereby deny the petitions for reconsideration filed by Lake Broadcasting, Inc., and Central Missouri Broadcasting, Inc.

Respectfully submitted,

REICHEL BROADCASTING CORPORATION

By: 

Howard A. Topel
Mark N. Lipp

Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Avenue, N.W., #300
Washington, D.C. 20036
(202) 659-4600
Its Counsel

February 15, 1996

REICHEL BROADCASTING CORP.
WAYNESVILLE, MISSOURI
FM SPACING STUDY

Title: WAYNESVILLE, MO
Channel 264A (100.7 MHz)

Latitude: 37-49-09
Longitude: 92-09-06
Safety zone: 30 km

Call	Auth	Licensee name	Chan	ERP-kW	Latitude	Br-to	Dist.	Req.
City of License	St	FCC File no.	Freq	FAH-m	Longitude	-from	(km)	(km)
KTTK	LIC	LEBANON EDUC BROADCASTIN	*210A	.39	37-40-34	251.3	49.24	10
LEBANON	MO		89.9	46	92-40-50	71.0	39.24	CLEAR
TO CHANNEL *214C3; Call Granted 12/13/84; Ant: Harrie FML-3E								
KAKU	CP	AMERICAN FAMILY ASSOCIAT	*211A	6	37-11-10	227.8	104.3	10
SPRINGFIELD	MO	BPED-931223MA	90.1	100	93-01-23	47.3	94.28	CLEAR
CP Granted 03/31/95 per FCC release #22127 dated 04/12/95; CP Granted 03/31/95 per FCC release #22127 dated 04/12/95; Call Granted 05/26/95 per FCC release #255 dated 05/26/95								
KJMO	LIC	TRIPLE-D PROPERTTRES, INC	261C2	33	38-31-25	344.2	81.33	55
JEFFERSON CITY	MO	BLH-910606KE	100.1	183	92-24-25	164.0	26.33	CLEAR
Ant: Elec. Res. Inc. SHPX-4AE								
KUKU-FM	LIC	101 COMMUNICATIONS, INC.	262C2	50	37-03-49	172.5	84.57	55
WILLOW SPRINGS	MO	BLH-890511KA	100.3	150	92-01-39	352.6	29.57	CLEAR
Was KGAR 09/24/93 per FCC release #215 dated 10/01/93								
KKCA	ORD	KFAL INCORPORATED	263A		38-51-58	8.4	117.5	72
FULTON	MO		100.5		91-57-14	188.5	45.49	CLEAR
DOC-87-493; ORDERED FROM 249A								
KZMM	LIC	JAMES C MAGEE	264A	6	39-03-13	35.9	170.1	115
TROY	MO	BLH-931123KB	100.7	100	90-59-47	216.6	55.15	CLEAR
Hearing DOC-91-89, adopted 03/27/91, released 04/29/91; Call Granted 10/09/92 per FCC release #192 dated 10/09/92; Ant: Elec. Res. Inc. SHP-3E								
KMZU	LIC	KANZA INCORPORATED	264C1	98.6	39-21-59	328.1	203.4	200
CARROLLTON	MO	BPH-900103IC	100.7	302	93-24-12	147.3	3.445	CLOSE
KGMO	LIC	WITHERS BROADCASTING COM	264C	100	37-22-16	101.4	236.7	226
CAPE GIRARDEAU	MO	BLH-920629KF	100.7	301	89-31-52	283.0	10.72	CLOSE
Ant: FMXH-10AC								
RM		RULE MAKING PETITION	265A		38-07-29	306.6	57.31	72
OSAGE BEACH	MO	DOC-90-66	100.9		92-40-39	126.2	-14.7	SHORT
Received at FCC 05/07/90 per FCC release #1816; DOC-90-66; COUNTERPROPOSAL TO DOC-90-66								

FROM : THE RICHARD L. MEGA GROUP

REICHEL BROADCASTING CORP.
WAYNESVILLE, MISSOURI
FM SPACING STUDY

Title: WAYNESVILLE, MO
Channel 264A (100.7 MHz)

Latitude: 37-49-09
Longitude: 92-09-06
Safety zone: 30 km

Call	Auth Licensee name	Chan	ERP-kW	Latitude	Br-to	Dist.	Req.
City of License	St	FCC File no.	Freq	FAH-m	Longitude	-from	(km) (km)
KTUI-FM LIC	FOUR RIVERS BROADCASTING	265A	3	38-11-42	63.1	94.46	72
SULLIVAN	MO BLH-810223AG	100.9	84	91-11-12	244.0	22.46	CLEAR
WVRV CP	RIVER CITIES BROADCASTIN	266C2	44DA	38-39-08	59.8	187.8	55
EAST SAINT LOUIS	IL BPH-950516IF	101.1	158	90-17-03	241.0	132.8	CLEAR
CP Granted 08/07/95 per FCC release #* dated 08/10/95; CP Granted 08/07/95 per FCC release #* dated 08/10/95; Was WFXR 12/01/94 per FCC release #244 dated 12/09/94							
KTXR LIC	STEREO BROADCASTING, INC	267C	100	37-11-40	225.1	97.97	95
SPRINGFIELD	MO BLH-920625KB	101.3	360BT	92 56-04	44.6	2.967	CLOSE
Ant: Harris FMH-8AC							

>> End of channel 264A study <<

CERTIFICATE OF SERVICE

I, Veronica Abarre, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, P.C., hereby certify that I have, on this 15th day of February, 1996, sent by first-class U.S. Mail, postage prepaid, copies of the foregoing "OPPOSITION TO PETITION FOR RECONSIDERATION" to the following:

- * Mr. John A. Karousos
Chief, Allocations Branch
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.--5th Floor
Washington, D.C. 20554

- * Ms. Kathleen Scheuerle
Allocations Branch - Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.--5th Floor
Washington, D.C. 20554

Howard J. Braun, Esq.
Jerold L. Jacobs, Esq.
Rosenman & Colin
1300 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel to Lake Broadcasting, Inc.)

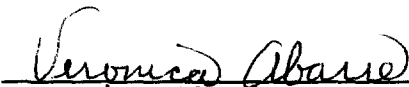
Alan C. Campbell, Esq.
Irwin Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W.
Suite 200
Washington, D.C. 20036-3101
(Counsel to Central Missouri Broadcasting, Inc.)

* HAND DELIVERED

Frank Jazzo, Esq.
Andrew S. Kersting, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street--11th Floor
Rosslyn, VA 22209
(Counsel to Zimmer Radio of Mid-Missouri, Inc.)

Mr. Tony Krupp
507 Booneville Road
Jefferson City, MO 65101

Mr. Jeff Weinhaus
Route 1, Box 395
Leasburg, MO 65535


Veronica Abarre